No. 82-1349

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner*,

v.

EMMA ROSA MASCHER, *et al.*

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

## BRIEF OF RESPONDENTS EMMA ROSA MASCHER, *ET AL.*

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## QUESTIONS PRESENTED

1. Whether the United States is liable for the negligence of its employees in the conduct of inspections of aircraft mandated by Federal law and regulations and relied upon by the public?

2. Whether the negligent failure of a Federal Aviation Administration ("FAA") engineer, in the course of an inspection of an aircraft lavatory trash container to determine if the container, which had no lid, was therefore incapable of containing a fire, involves the sort of discretionary judgment which is not actionable by reason of 28 U.S.C. 2680(a), the "discretionary function" exception?

3. Whether negligence in the inspection of an aircraft, as a result of which an obvious and dangerous defect is either created or overlooked, constitutes a "misrepresentation" which is not actionable by reason of 28 U.S.C. 2680(h), the "misrepresentation" exception?

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### STATEMENT

**1. The Accident And Investigation**

On the morning of July 1, 1973, a Boeing 707-300 aircraft operated by Varig Airlines was cleared to descend from its cruising altitude as it approached the Orly Airport, Paris, France. The aircraft was fully loaded, and after an 11½ hour transatlantic flight from Brazil, passengers were moving about the cabin making preparations for the final landing at their destination. As the aircraft descended below 10,000 feet, one of the passengers advised a steward of the sudden appearance of a large volume of white smoke in one of the aft lavatories. In the next few minutes, the smoke turned from white to black, totally filled the passenger compartment, invaded the

flight deck forcing the crew to don oxygen masks, and so obscured their vision that they could not see the instruments located but a few feet in front of them. In an attempt to remove the smoke and save the passengers' lives, they depressurized the aircraft, but to no avail. Recognizing that all aboard would die unless the aircraft could be landed, they opened the sliding windows on either side of the cockpit in order to see the ground and accomplished a forced landing in a farmer's field.

Though the landing was successful, the evacuation was not. All passengers save one and many of the extra crew members required to be on board because of the exceptional length of the flight died while strapped in their seats by reason of inhalation of the hydrogen cyanide, hydrogen flouride and carbon monoxide produced by the burning plastic material in the interior of the aircraft.[1]

The French Government issued a report[2] in which it found that the fire probably started in a trash container under the sink in the starboard lavatory which was probably full of paper after the long trip.[3] The French officials also concluded that the trash containers themselves were probably not in compliance with the U.S. regulations under which the aircraft had been built in that they did not contain the fire.[4]

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[1] Passenger oxygen masks, unlike those of the crew, are ineffective in the case of smoke and toxic gas, since they do nothing more than mix pure oxygen with ambient cabin air. *J.A.* 95.

[2] *J.A.* 49.

[3] *J.A.* 98.

[4] *J.A.* 97. CAR 4b 381(d) states in pertinent part: "All recepticals [sic] for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires."

**2. Proceedings Below**

Suit on behalf of survivors of sixty-two deceased passengers against the United States was instituted in the Central District of California.[5]

Following limited discovery and depositions of some government employees, the District Judge granted summary judgment under Rule 56, F.R.C.P. and found, as a matter of fact, that: "the inspection of aircraft accomplished by the FAA is a regulatory function not an operational service like air traffic control."[6]

Significantly, the District Court expressly declined to find, as a matter of fact, that:

a) The . . . inspection and certification of the Boeing 707 did not increase the risk of harm to the plaintiffs (passengers).

b) The . . . inspection and certification of the Boeing 707 did not induce reliance by the plaintiffs (passengers).[7]

Based upon these and other findings of fact, the District Court concluded, *inter alia*, as a matter of law, that:

a) The law of California applies to this action.

b) The Government is liable under the Tort Claims Act only to the extent a private person under like circumstances would be liable.

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[5] 28 U.S.C. 1402(b) provides that suit against the United States may be instituted only in the District Court where the plaintiffs reside or where the act or omission occurred. Plaintiffs alleged that the negligence of the Federal Aviation Administration (FAA) occurred in the Western Region of the FAA, headquartered in Los Angeles, California.

[6] Finding of Fact ¶ 11 (E.R. 44).

[7] Proposed Finding of Fact ¶¶ 13, 14 (E.R. 44).

c) California law does not recognize a cause of action on the part of a private individual, for negligence in inspection and certification activities.

d) The Government had no legal duty to the passengers by reason of the promulgation of safety standards, by its undertaking to promote air safety, or by reason of the Federal Aviation Act of 1958.

e) No duty arises under the California Good Samaritan doctrine.

f) Any valid claims of the passengers against the Government were barred by the discretionary function exception[8] or the misrepresentation exception[9], or both.[10]

On appeal, the Ninth Circuit reversed.[11] It agreed that these actions were governed by the law of California. But it disagreed with the District Judge in every other material respect. The Court held that under the California Good Samaritan doctrine, the Government would be liable in the performance of an inspection of an aircraft, just as would a private individual, if the Government, by reason of an act or omission committed in the course of the inspection either (a) increased the risk of harm to third parties (*i.e.* the passengers) or (b) caused those third parties to rely on proper performance of the inspection.[12] Such inspections, mandated as they are by Federal law and regulations, are a service which the FAA has

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[8] 28 U.S.C. 2680(a).

[9] 28 U.S.C. 2680(h).

[10] Petition for Writ of Certiorari, Appendix B at 10a-12a.

[11] *S.A. Empresa de Viacao Aerea Rio Grandense, et al.* v. *United States*, 692 F.2d 1205 (9th Cir. 1982) (hereinafter "*Varig* v. *USA*").

[12] *Id.*

voluntarily undertaken to perform for the flying public, and not a regulatory activity exempt from liability. Indeed, "[e]ven without reference to the Good Samaritan Rule . . . an action against the government will lie in a negligent inspection and certification case."[13]

Finally the Court of Appeals concluded that neither the misrepresentation exception nor the discretionary function exception would bar these actions.

## SUMMARY OF THE ARGUMENT

Inspections of aircraft are conducted at many levels, beginning with the inspections of the design drawings and the prototype of each model aircraft, as described by the Petitioner.[14] Individual production aircraft of the transport category are checked again as they leave the factory to determine that they match the previously approved prototype. Finally, once the aircraft is in operation, the inspection process continues. Transport category aircraft are inspected by their operators before each flight, and periodically are subjected to overhauls in the field. Each inspection is accomplished on the presumption that the underlying and preceding inspections have been accomplished. Each is as much a necessary part of each operational flight as every other.

The inspection of design drawings and the protoype aircraft to determine whether trash containers were constructed of fire resistant material and in such a manner as to contain any possible fire[15] was thus both necessary and

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[13] *Id.* at 1208, *citing, Arney* v. *United States*, 479 F.2d 653, 661 (9th Cir. 1973).

[14] Petitioner's Brief at 4-9.

[15] CAR 4b 381 (d), *supra* note 4.

operational. Passengers rely on the Government to conduct such inspections in part because of the wide publicity given this effort by the media and the FAA itself.[16] Such inspections hardly involve the kind of administrative use of discretion which would place the act within the protective perimeter of the discretionary function exception.[17] Nor, for that matter, is the misrepresentation exception of any greater applicability since here the gravamen of the action is negligence in the inspection itself,[18] not the negligent misrepresentation of the condition of the aircraft conveyed by any certificate issued as a result of it.[19]

## ARGUMENT

### 1. Inspections By Government Engineers Are Operational

The Government asserts that the "private person" limitation[20] of the Tort Claims Act was intended not only to "adopt state law as the rule of decision for imposing tort liability, but also to *preserve inviolate from tort suits a core of governmental activities that are never engaged in by private citizens.*"[21]

By this the Government has reduced itself to the argument that inspections accomplished in the course of certifying a transport category aircraft as having been designed and built in accordance with its own standards are "uniquely governmental" so as to raise them to the level of regulatory activities which are immune from suit.

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[16] *J.A.* at 99-100.

[17] *Dalehite* v. *United States*, 346 U.S. 15 (1953).

[18] *Block* v. *Neal*, ___ U.S. ___, 103 S.Ct. 1089 (1983).

[19] *United States* v. *Neustadt*, 366 U.S. 696 (1961).

[20] 28 U.S.C. §§ 1346(b) and 2674.

[21] Petitioner's Brief at 23 (emphasis added).

By this type of reasoning the Government hopes to plaster the label of regulatory activity all over the acts complained of, thus diverting this Court's attention from their true nature.

In so doing, the Government seeks to move the field of battle away from the inspections which it negligently performed to the certificates which it negligently issued. It does so for three reasons. First, it seems obvious that inspections are conducted every day by private persons, whereas the certification of aircraft sounds a great deal more like the sort of "core of governmental activities" which the Congress supposedly sought to immunize through the use of the "private person" limitation.[22] Second, if it can be successfully argued that the deceased passengers really relied to their detriment on the certificate rather than the inspection which preceded it, then the misrepresentation exception might be raised to bar the suits.[23] Last, if the facts can be equated to regulatory activity in other areas, then the predictable "parade of horribles" becomes a more persuasive argument.[24]

The facts of the case are such, however, that they cannot be easily mislabeled. The Government explains at length the scheme by which inspections and certifications of transport category aircraft are made and emphasizes that "the vast majority of the FAA's inspections are performed by 'designated engineering representatives' "

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[22] Ignoring, for the moment that under California law a duty exists to conduct such inspection with due care. *Hanberry* v. *Hearst Corp.*, 276 Cal. App.2d 680, 683, 81 Cal. Rptr. 519, 521 (Ct. App. 1969).

[23] *United States* v. *Neustadt*, *supra* note 19; *Marival, Inc.* v. *Planes, Inc.*, 306 F.Supp. 855 (N.D. Ga. 1969).

[24] Petitioner's Brief at 26-27.

who are *usually* employees of the manufacturer carrying special FAA designation.[25]

In the instant case, however, the record shows that the offending inspection was done by FAA employees, and the lavatory waste receptacle design which they supposedly inspected could not conceivably have met the minimum standards required by the regulations. Examination of a sister ship in Rio de Janeiro, Brazil, after the accident, revealed that the trash "container" under the sink in the lavatory was in reality no container at all. Paper towels stuffed into the flapper door at one side of the sink module simply fell down into the area directly below the sink. This volume of space also contained the electric water heaters and a source of air. Not only was there no container, as such, but the module walls themselves were penetrated in several spots by large round holes, the purpose of which was never established and the presence of which simply assured that any fire developing below the sink would have an adequate supply of oxygen and immediate access to the plastics on the inside of the aircraft pressure hull.

In fact, even the FAA engineer detailed to investigate the accident stated in a report addressed to his seniors:

> It was also observed in the waste container area of most lavatories that there were numerous holes through the vertical panels between compartments leading to other compartments and in some cases to the aircraft skin. This created an interesting revelation and *it was not clear how the waste containers could possibly contain fire*, as required by CAR 4b 381(d) and FAR 25.853(d).[26]

That same engineer drafted a proposed Airworthiness Directive in which he made the determination that "most

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[25] *Id.* at 8.

[26] 1 Nelson Deposition at 17, Exhibit 26 (emphasis added).

containers in all [jet transports] must be modified to provide simple and obvious containment".[27] In his opinion, the aircraft would not have been certified "if it had not been approved-reviewed" by FAA inspectors.[28] "(FAA) Manufacturing inspectors should be alert for any detail design feature which does not appear to comply with pertinent regulattions."[29]

A letter dated March 20, 1967, from Boeing to the Director, Western Region, FAA, states, with respect to inspection of the interior of Boeing 707 aircraft by FAA engineer Bulmer: "There were numerous items found during the inspection which were considered unacceptable by Mr. Bulmer *and were modified to his satisfaction prior to delivery of the airplane.*"[30]

Depositions of that person revealed that he knew the reason his position or job existed was to promote air safety.[31] He further knew that the beneficiaries of his work were the flying public and the operators of the airplanes.[32] He also knew the flying public depended on him to do his job in the interests of air safety.[33]

Thus, the situation is exactly parallel to that which exists whenever a private person possessing special knowledge, credentials and opportunity voluntarily undertakes to inspect, and others, not having either the

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[27] 2 Nelson Deposition at 356-357.

[28] *Id.* at 442.

[29] 1 Nelson Deposition at 39, Exhibit 34.

[30] Curtis Deposition at 151 (emphasis added).

[31] Bulmer Deposition at 89-90.

[32] *Id.* at 90.

[33] *Id.*

expertise or the opportunity, rely on the fact of such inspections to their detriment. Passengers know the government inspects, and have reasonably come to believe that the American-built aircraft in which they fly are safe for that reason. Such inspections may be conducted in the course of an effort to enforce the minimum standards of the regulations, but as such, they are no different than any other governmental activity.[34] The question is whether the conduct complained of, if accomplished by a private person, would subject the government to liability in accordance with the law of the place where the act or omission occurred.[35]

**2. The Voluntary Nature Of The Governmental Undertaking**

A voluntary undertaking by the Government to invade every facet of the aviation industry is apparent throughout the statutory scheme.

Congress was under no duty to pass the Federal Aviation Act of 1958, requiring the Administrator to certify (but not to inspect) all transport category aircraft. But Congress did, and in doing so recognized that the flying public, by reason of past practices and existing legislation, would rely on the Government for "maintenance of the safety vigilance that has evolved within air transportation and air commerce *and has come to be expected by the travelling . . . public.*"[36]

Though not required by statute, the FAA voluntarily and unilaterally decided that inspections were to be part

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[34] Air traffic controllers, whose activity is classically "operational" are simply enforcing the Federal Aviation Regulations.

[35] 28 U.S.C. § 1346(b); *Hanberry* v. *Hearst Corp.*, *supra* note 22.

[36] 49 U.S.C. § 1302(a)(2) (Supp. IV 1980) (emphasis added).

of the method by which the requirements of the law should be met. Neither the Civil Aeronautics Act of 1938 (hereinafter the "Act of 1938") nor the Federal Aviation act of 1958 (hereinafter the "Act of 1958") required the Administrator to inspect the design of transport category aircraft for compliance with the regulations. Section 603(a) of the Act of 1938, and its companion section of the Act of 1958 simply state:

> The Administrator shall make, or require the applicant to make such tests during manufacture and upon completion as the Administrator deems reasonably necessary *in the interests of safety*. . . . If the Administrator finds that such aircraft . . . is of proper design, material, specification, construction and performance *for safe operation* and meets the minimum standards, rules and regulations . . . he shall issue a type certificate.[27]

By regulation, however, the Administrator chose to inspect transport category aircraft (as opposed to light aricraft) for compliance.[28]

Thus, the Agency did not inspect because it was required to do so by a contract, or pursuant to an enforcement scheme. Rather it volunteered to inspect in order to protect the flying public, and then publicized its undertaking in the *Code of Federal Regulations*.

The former chief of the Aircraft Engineering Division of the Western Region of the FAA and present Director, Office of Airworthiness, testified in this case that two different inspection and certification systems are in effect, one available only to manufacturers of general (light)

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[27] 49 U.S.C. § 1423(a)(2) (1970) (emphasis added).

[28] CAR 4b; FAR Part 25; Beard Deposition at 14, 38, 109-111.

aviation aircraft and the other to manufacturers of transport catgory aircraft. In the former category inspections are conducted by the Designated Engineering Representatives; in the latter mostly by FAA engineers.[39]

He also testified that an airworthiness certificate signifies to the public and the manufacturer that a particular airplane conforms to an approved design and is in condition for safe flight.[40] Likewise, type certificates are given immediate publicity by the manufacturer "because they were so proud they could get the certificate and it helped them in their marketing".[41] A statement is also published in the Federal Register "to advise the world that we have issued a type certificate".[42]

Various inspections are conducted by the FAA, including compliance inspections, conformity inspections, production system inspections and aircraft inspections.[43] The purpose of all inspections is air safety, and the intended beneficiaries are the passengers and the operators of the airplanes.[44]

The factual picture which thus emerges is quite different from that which appears from a reading of Petitioner's brief. The substance of it is this: That the Congress gave the Administrator of the FAA the authority and responsibility to approve aircraft designs, prototypes and production models. The FAA, through regulations, then

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[39] Beard Deposition at 14, 38, 109.

[40] *Id.* at 48.

[41] *Id.* at 50-51.

[42] *Id.* at 52.

[43] *Id.* at 113.

[44] *Id.* at 114-115.

voluntarily undertook to do so in two different ways; one with respect to private or "general aviation" aircraft and another with respect to aircraft intended for the carriage of passengers for hire. In the latter category much more stringent inspections were made far more often by many more FAA engineers. This fact received wide publicity and many members of the flying public, including some if not all of the passengers aboard the ill-fated flights, relied to some greater or lesser extent on these engineers to do exactly what the FAA said they would do—inspect for compliance with the minimum standards predicated by the regulations.

Having voluntarily undertaken this line of conduct, with full knowledge that the public would come to rely on it, the Government should be held liable for the negligence of its engineers in the conduct of such inspections.[45]

### 3. Publicity Given To The Voluntary Undertaking

Aside from the widespread notoriety which necessarily follows the passage of a public law[46] and the somewhat less effective, but legally efficient, publication in the Federal Register, the FAA has tooted its own horn repeatedly, and even the most atonal listener will hear quite a different tune than that sung by the Government in its brief.

The Pilot's Handbook of Aeronautical Knowledge, an FAA Advisory Circular used as a basic instructional

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[45] *Coffee* v. *McDonnell Douglas Corp.*, 8 Cal. 3d 551, 503 P.2d 1366 (1972); *Brockett* v. *Kitchen Boyd Motor Co.*, 264 Cal. App.2d 69, 70 Cal. Rptr. 136 (1968); *Schwartz* v. *Helms Bakery Ltd.*, 60 Cal. Rptr. 510, 430 P.2d 68 (1967); *Weirum* v. *RKO General Inc.*, 123 Cal. Rptr. 468, 539 P.2d 36 (1975); *Roberts* v. *Ball, Hunt, Brown & Baerwitz*, 57 Cal. App.3d 104, 128 Cal. Rptr. 901 (1976).

[46] 49 U.S.C. 1302(a)(2).

manual for members of the public interested in aviation, and a primer for all interested in aviation, has this to say with respect to the inspection and certification process:

> One of the most important activities in promoting safety in aviation is the airworthiness certification of airplanes. Each airplane certificated by the Federal Aviation Administration has been manufactured under rigid specifications of design, materials, workmanship, construction, and performance. *This certification process provides adequate assurance that the airplane will not fail from a structural standpoint* if the airplane is properly maintained and flown within the limitations clearly specified.[47]

Even more to the point is this language from an official FAA article authored and published by the FAA entitled: *The FAA Stamp of Approval: How the Agency Ensures Safe Aircraft.*

> When the Boeing 767 goes into airline service late in 1982, it will carry with it what amounts to a *warranty from the Federal Aviation Administration that the aircraft is as safe as man and the state-of-the-art can make it.*
>
> *That warranty, which will be over and above any warranty offered by the manufacturer, will be embodied in the Type Certificate* the FAA will have to issue before the aircraft can go into passenger service.
>
> The Type Certificate will serve notice that the 767—a quiet and fuel-efficient twin-engine, wide-body airplane that will be the first of the fourth generation of jet transports—meets all of the FAA's standards for safety and reliability.
>
> It will be issued only after the most thorough testing and evaluation program a new type of aircraft

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[47] FAA Advisory Circular 61-23A, at 33 (1971) (emphasis added).

> has ever undergone, a job to which the FAA will devote up to 50,000 hours of work.[48]

Such pronouncements made repeatedly over the years have created, in the public mind, an image of FAA activity and a reliance on FAA efficiency which is to be expected under the circumstances.

As stated by a brother of Elio Rosa, an American chemical engineer who died on the fatal flight, the deceased had "complete faith in the American planes he flew" and "would never fly on foreign built aircraft . . . because he doubted that the foreign planes had the same rigid government inspections. . . ."[49] From this, one must conclude that Rosa, and other passengers, had developed a reliance that Government inspectors would do their duty with reasonable care—the same sort of reliance which the Congress foresaw when it amended the Act of 1958[50] and which was recognized by Jack Bulmer, whose duty it was to inspect, and by Craig Beard, whose duty it was to supervise.[51] The lips of all the passengers have been forever sealed by the very negligence which the FAA now seeks to avoid, and as a result, it may be difficult, if not impossible for this additional reason, to obtain evidence of the specific reliance on the part of each one. Nevertheless, the passengers contend that the continuing and well publicized nature of the tests and inspections of the FAA have reinforced just what Congress said they had already accomplished in 1980, *i.e.* to create an

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[48] Farrar, *The FAA Stamp of Approval: How the Agency Ensures Safe Aircraft*, FAA World, Vol. 11, No. 1, January 1981, at 5.

[49] *J.A.* at 99-100.

[50] 49 U.S.C. 1302(a)(2).

[51] Bulmer Deposition at 90; Beard Deposition at 114-115.

expectation amongst the travelling public that the FAA will maintain the safety standards which have evolved in commercial air transportation.[52]

For instance, the spectacular crash of an American Airlines DC-10 in Chicago in May of 1979 focused the interest of the entire nation on the certification process, and brought about the creation of a "blue ribbon panel" of experts to examine the manner in which it works. A report was produced by the panel[53] in which the conclusion, with respect to the certification system, was that "the worldwide acceptance of U.S. built airplanes, confirm that *our nation's system for assurance of airworthiness* operates quite well."[54]

Hearings held by the panel confirm the fact that representatives of industry, the FAA and the public share the same perception regarding the true role of the FAA in the inspection and certification process.

The same Craig Beard, Director of Airworthiness for the FAA, told the panel that he would provide them with a briefing on the statutes and regulations, in the course of which he would describe *"the procedures through which we assure airworthiness."*[55]

Though careful to point out that "those that conceive [the airplane], make it, operate it and handle it are those

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[52] 49 U.S.C. 1302(a)(2) (& Supp. IV 1980).

[53] See Petitioner's Brief at 5-6, and reference to the "NAS Report."

[54] Committee on FAA Airworthiness Certification Procedures, National Research Council, National Academy of Sciences, *Improving Aircraft Safety*, (hereinafter "NAS Report"), Letter of Transmittal by Philip Handler, Chairman, National Research Council, June 24, 1980, at 2 (emphasis added). A copy of the report has been lodged with the clerk.

[55] NAS Hearings at 26, January 21, 1980 (emphasis added).

who do have the greatest opportunity to affect its airworthiness,"[56] he admitted that "the FAA plays an important role in assuring the public and the people who work with the aircraft of their safety."[57]

As to the role of the Designated Engineering Representatives, the importance of which is so emphasized by the Petitioner,[58] he testified:

> [T]he [Federal Aviation] Act permits us to delegate functions. It does not permit us to delegate our responsibilities. So, when we designate a function to a designated engineering representative *we still consider ourselves responsible for the actions of the person*, and when he represents the Administration *it is an act of the FAA.*[59]

This is a view widely held throughout industry. In the same hearings, Mr. Richard Taylor, Vice President and Special Assistant to the President of Boeing, was asked this question and gave this answer:

> Q. Is it your impression that the people from the insurance industry in the world market . . . accept the FAA certificate or whatever country's certificate, that they accept Boeing, Lockheed and Douglas; they accept all this as the good housekeeping seal; they don't have their own labs for testing? . . . [T]he FAA is the underwriters lab for aircraft? Is that your impression?
>
> A. If I understand your question I think it is yes.[60]

This perception of a shared duty is also held by the airlines who operate the aircraft. At the same hearings Mr.

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[56] *Id.* at 28.

[57] *Id.*

[58] Petitioner's Brief at 8 & n.7, 9 & n.8.

[59] NAS Hearings at 33, January 21, 1980 (emphasis added).

[60] *Id.* at 327.

Richard Tabery, Senior Vice President for Maintenance Operations of United Airlines was questioned on the desirability of changing the certification process. His answer was: "We see no basis for a substantial opening up of the certification process. It has been United's experience that when a duty is shared by too many persons there may be confusion as to where the ultimate responsibility does lie."[61] Later he clarified the perception of his airline as to the identity of the parties sharing that duty: "That is the [domain of] the FAA and the manufacturer to produce an airworthy airplane."[62]

Not only members of the industry share this view. Cornish F. Hitchcock, Associate Director, Aviation Consumer Action Project, testified that, in his view: "The certification process is the pivotal stage in the area of aviation safety. In the exercise of its certification powers the FAA can and should really ensure that all the design characteristics provide maximum safety."[63]

Similarly an official of the Airline Passengers Association[64] testified that, in the view of his organization, "[i]t is the duty of the FAA to ensure that planes are properly and safely operated, built, maintained and designed."[65]

Subsequently, the same witness was asked:

Q. [I]s not the FAA intended to be an informed surrogate for the public, the informed and qual-

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[61] *Id.* at 389, January 22, 1980.

[62] *Id.* at 409.

[63] *Id.* at 435, January 23, 1980.

[64] At the time, the Association numbered 50,000 members, averaging 40 airline trips per year each. *Id.* at 517.

[65] *Id.* at 526.

> ified guardian of the passengers' interest and the public interest . . .?
>
> A. Absolutely. That is supposed to be their duty.[66]

As to the division of responsibility between manufacturer, airline operator and the FAA, the same witness testified:

> [I]f I might clarify it again, No. 1 with respect to the FAA and any manufacturer our complaint was never with [the manufacturer]. . . . It was never with the [airline]. . . . *Our complaint was really with the FAA. It was their duty to protect us as passengers, to assure that everything is properly done, and if there is a problem we look to them to ask why.*[67]

The Respondent passengers herein do not assert that the FAA *insures* their safety, but do maintain that their decedents, like airline passengers all over the world, relied on repeated *assurances* of the maintenance of minimum standards by that agency.

Such pronouncements have been as continuous over the years as they have been insidious.

In 1962, an official publication of the Federal Aviation Administration published "in the interest of aviation safety and to acquaint readers with the policies and programs of the Agency"[68] stated, with regard to the role of the Agency in the inspection process:

> While all those connected with the industry are vitally concerned with safety, *it is the FAA's manufacturing inspectors who control final approval of the entire product as well as the components*—engine,

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[66] *Id.* at 551-552.

[67] *Id.* at 564-565 (emphasis added).

[68] FAA Aviation News, October 1962 at 1.

> propeller, even seat belts. These inspectors spend thousands of hours evaluating, checking and inspecting *to be sure* the airplaine meets safety requirements.[69]

The same article made it clear to the public that: "The airworthiness certificate awarded the finished aircraft . . . [signifies] that the aircraft and all its parts conform to the type design and are in a condition for safe operation. *Each airplane that comes off the production line is individually inspected before the certificate is issued.*"[70]

A different article in the same publication a year later stated with respect to the Boeing 727 aircraft: "each airplane built will be issued an Airworthiness Certificate, the final *FAA stamp of approval indicating that the airplane conforms to the Type Certificate and is ready for safe operation in commercial service.*"[71]

These same pronouncements have been repeatedly made by others, over the years, including a most vocal and visible FAA Administrator, appearing before a subcommittee of the House of Representatives:

> I am concerned from the standpoint of being somebody who flies on airplanes. I think [the public's] general impression of what the FAA does is guarantee them an essentially safe flight. I think when they get aboard an airplane they are under the impression that the airplane is safe, that the airways are safe,

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[69] *Every Day's A Busy One for FAA Manufacturing Inspectors*, FAA Aviation News, October 1982, at 12 (emphasis added).

[70] *Id.* at 13 (emphasis added).

[71] *First Boeing 727 Airliner Leaves Factory for Extensive Ground Testing*, FAA Aviation News, January 1963, at 4 (emphasis added).

> and that the Government is giving them some kind of guarantee of safe passage.[72]

Again, the same Administrator, testifying on the question of the recertification of the DC-10 aircraft following its grounding as a result of a spectacular accident in Chicago, was asked this question and gave this answer:

> Q. So far as you are concerned, based upon the experience of the last several days, the public can take confidence in the fact that, *once you recertify the DC-10's*, we are going to be assured that those are safe airplanes?
>
> A. Yes.[73]

Nor can there be any doubt that this same Administrator was aware of the reliance and the legal responsibility therefor which the public placed on the inspection process:

> Q. (by Congressman Walker) [Y]ou would be satisfied if we wrote the report assuring the flying public that they were flying a safe aircraft if they got aboard the DC-10?
>
> A. (by Mr. Bond) Let me caution the committee that when it goes over into recommendations on regulatory business, it then becomes accountable for

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[72] *FAA Certification Process and Regulation of Illegal Commercial Operators: Hearings Before the Subcommittee on Governmental Activities and Transportation of the House of Representatives Committee on Government Operations*, 95th Congress, 2nd Sess. 353-354 (1978) (Testimony of Langhorne Bond, Administrator of the FAA).

[73] *FAA Certificaton Process: Hearings Before the Subcommittee on Governmental Activities and Transportation of the House of Representatives Committee on Governmental Operations*, 96th Congress, 1st Sess. 63 (1979) (Testimony of Langhorne Bond, Administrator of the FAA) (emphasis added).

> what it recommends. That is very difficult *inasmuch as we are responsible for it all.*[74]

Once the certificate issues, all the governments of the world who are signatories of the Chicago Convention[75] may justifiably rely on the completion of inspections which lead to the issuance of certificates, and, based thereon, issue their own airworthiness certificates.[76] If they may rely, may not their citizens?

The District Judge knew they could. In the face of overwhelming and uncontradicted evidence, he expressly declined the Government's invitation to find that there was no reliance by any plaintiff, whether the airline itself or the individual passengers or crew members, and struck those paragraphs from the proposed Findings of Fact and Conclusions of Law.[77] The Court of Appeals knew it also:

> Members of the flying public may not know the specific contents of the F.A.A. regulations. There is general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance of the F.A.A. of its duty to inspect and certify.[78]

Clearly then, the facts of this case point to the voluntary undertaking of a service, and justifiable reliance by

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[74] *Id.* at 491.

[75] Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

[76] Beard Deposition at 54.

[77] Proposed Findings of Fact ¶¶ 13, 14 (E.R. 44).

[78] *Varig* v. *USA*, *supra* note 11, at 1208.

members of the class of persons to whom the service was extended.[79]

**II The Discretionary Function Exception Does Not Apply**

In this case, a GS-13 Government inspector was required to inspect. FAR, Part 25. CAR 4b318(d). The plaintiffs contend that the evidence leads to the conclusion that he did so, but negligently. His manual, and the checklist fashioned pursuant to it, simply require him to view the design drawings, prototype or production aircraft and compare it or them with the regulation. Phrased in its simplest terms, what was required of him was a determination whether or not the trash container could contain a fire. That was a decision at the operational, not the planning level, and even if the activity were uniquely governmental, as the Petitioner argues, a breach of the duty to exercise due care would not be protected.[80]

**III The Misrepresentation Exception Does Not Apply**

The passengers did not rely on any of the *certificates* issued by the FAA; rather they relied upon the FAA to use due care in the conduct of *inspections*. This state of facts places the case directly within the ambit of *Block* v. *Neal*,[81] and beyond the reach of the misrepresentation exception.

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[79] *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957); *United States* v. *Muniz*, 374 U.S. 150, 159 (1963).

[80] *Indian Towing Co.* v. *United States*, *supra* note 79.

[81] *Block* v. *Neal*, *supra* note 18.

## CONCLUSION

The Government, in its Brief argued strenuously that it cannot be held liable for regulatory activities, among which are licensing, certificating and inspecting.[82]

Regulatory activities, of course, include a broad spectrum of governmental conduct. And, so argues the Government, private persons by definition do not regulate or certify aircraft—only Governments do. Therefore, since by the express language of the Tort Claims Act, the Government cannot be held liable for negligence "except in the same manner and to the same extent as a private individual under like circumstances . . .," 28 U.S.C. § 2674; it cannot be liable here.

The District Court apparently fell victim to this circular framing of the issue, for it ruled that "the United States inspection and certification of aircraft were regulatory functions, not 'operational' services like air traffic control";[83] that the Courts may not determine Government liability without considering the liability of private persons in like circumstances[84] and California law does not recognize an actionable tort duty in private persons *or governmental agencies* for inspection and certification activities.[85]

This amounts to nothing more than a juxtaposition of a new differentiation: operational tasks vs. regulatory functions for the old "uniquely governmental" vs.

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[82] Petitioner's Brief at 19, 25-29.

[83] Findings of Fact ¶ 11 (E.R. 44).

[84] Conclusions of Law ¶ 2 (E.R. 44).

[85] Conclusions of Law ¶ 3 (E.R. 44) (emphasis added).

"proprietary" dichotomy that has been expressly rejected by the Supreme Court.

> [The Government] argues that the Act only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and that neither the common law nor the law of Washington imposes liability on municipal or other local governments for the negligence of their agents acting in the "uniquely governmental" capacity of public firemen. But as we recently held in *Indian Towing Co.* v. *United States*, 350 U.S. 61, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity. To the extent that there was anything to the contrary in the *Dalehite* case is was necessarily rejected by *Indian Towing*.[*]

In other words, according to the 1957 opinion of Justice Black, the fact that no entity other than the government is currently engaged in a particular activity is no bar to liability. In fact, it begs the question, which was, is, and remains: Suppose a private person *did* inspect—or certify—would that person be liable? Under *Indian Towing*, *Rayonier* and their latest progeny, *United Scottish*

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[*] *Rayonier*, *supra* note 79, at 318-319.

*Insurance Co.*, the answer is clearly "yes." To put it another way, "negligent performance of a Federal statutory duty may rise to a claim under the Act in circumstances in which applicable state law recognizes a private cause of action."[57]

The Government also argues strenuously that to rule otherwise would amount to placing the Government in the shoes of an insurer with all its ominous fiscal implications which the Congress presumably did not contemplate. This notion, too, apparently influenced the District Court, which ruled that the United States "in performance of its regulatory functions . . . did not undertake to insure the safety of the subject aircraft."[58]

Again to quote Justice Black:

> The Government warns that if it is held responsible . . . a heavy burden may be imposed on the public treasury. . . . But after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits

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[57] *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188, 193 (9th Cir. 1979).

[58] Findings of Fact ¶ 23 (E.R. 44).

from the services performed by Government employees.[88]

In sum, the answer given by the District Court to the question put to it by the Government was correct, but the question which it answered was not the issue in the case. And when the proper question is framed, the answer can be just one: The Court of Appeals was correct, and the Government is liable.[89]

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[88] *Rayonier, supra* note 79, at 319-320.

[89] *See generally*, Krause and Cook, *The Liability of the United States for Negligent Inspection*, 49 Journal of Air Law and Commerce 727, 752-53 (Fall 1983).

**CERTIFICATE OF SERVICE**

Robert R. Smiley III, attorney for Respondents Mascher, *et al.* and a member of the Bar of the Court, certifies that on the 28th day of October, 1983, copies of the foregoing brief were served by mail upon all parties required to be served:

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